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No. 90-1612

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

ANTON JUNGHERR,
Petitioner,

VS.

SAN FRANCISCO UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, and MYRA KOPF, former President of the Board,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit properly refused to create a constitutional tort of malicious prosecution against a public official who brought an unsuccessful libel action to redress accusations of criminal misconduct.

2. Whether the Ninth Circuit correctly determined that a public official who files a defamation suit for damages to her reputation does not exercise state power under color of law for purposes of 42 U.S.C. § 1983.

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BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari filed by petitioner Anton Jungherr.

STATEMENT OF THE CASE

In October 1986, Myra Kopf, then president of the Board of Education of the San Francisco Unified School District ("SFUSD"), sued Anton Jungherr for defamation and intentional infliction of emotional distress. Kopf sought damages for harm done to her reputation by Jungherr's oral and written statements charging her with misconduct in the performance of her duties. Specifically, Jungherr accused Kopf of directing the District's business to a certain company in exchange for campaign contributions.

After Jungherr prevailed against the defamation action in state court, he countersued Kopf in federal court and named the Board of the SFUSD as a co-defendant. Jungherr sought to recover his litigation costs and other damages arising out of his defense of Kopf's lawsuit. The complaint, which alleged a single cause of action under 42 U.S.C. § 1983, was dismissed for failure to state a claim. The District Court and the Ninth Circuit Court of Appeals declined to establish a constitutional tort for what was essentially an allegation of malicious prosecution against Kopf. Finding no state action—Jungherr's federal complaint did not even allege that Kopf had acted under color of law—the appellate court held that the First Amendment adequately protects criticism of a public official by erecting a substantial burden of proof against any defamation recovery.

Jungherr's petition to this Court attempts to manufacture a false conflict between the holdings of the lower courts in this case and the general principle that government cannot recover damages for libel. Jungherr argues that the Civil Rights Act must provide redress against a public entity that sues a critic of government in defiance of this well-established principle. Jungherr's argument, however, rests on a patently false account of the original defamation action and the proceedings below. Simply put, this case is not about libel against the government; it is about an alleged libel against a public official. Jungherr accused Kopf of a serious crime, and such an accusation is an appropriate basis for a defamation action by a public official. Kopf was unsuccessful, but the fact that she failed to recover damages for harm to her reputation does not transform her lawsuit into a libel action by the state to punish criticism of government.

Jungherr's claim that he was sued for a libel against government is a recent invention that finds no support in his federal complaint. Jungherr alleged that he "made statements and comments regarding the transaction by defendant Myra Kopf of certain business of her co-defendant Board of Education." (Pet. App. at A-9, ¶ V.) No other person or entity is identified as the subject of his remarks. Finding these comments false and offensive, Kopf filed a lawsuit in the Superior Court for the City and County of San Francisco seeking damages against Jungherr for

defamation. (Pet. App. at A-9, ¶ VI.) Acknowledging that her position as a public official dictated the standard of proof for such an action, Kopf styled her complaint as *Myra Kopf, as President of the San Francisco Unified School District's Board of Education vs. Anton Jungherr*, No. 865-176. (Pet. App. at A-9, ¶ VI.) Kopf did not allege that she was acting for the SFUSD or any other person by filing the action; she sought damages only for harm done to her reputation by the alleged defamation.

Jungherr's federal complaint reflects the personal nature of Kopf's defamation action. Jungherr conceded that the Board of the SFUSD may sue and be sued as a public entity under California law (Pet. App. at A-8, ¶ I), yet Jungherr never alleged that the SFUSD was a party to the defamation action. Jungherr correctly stated that Kopf was the only plaintiff and that his alleged defamation was directed only at her. (Pet. App. at A-9, ¶¶ V-VI.) Jungherr's complaint did not state that Kopf acted under color of law when she sued Jungherr. His complaint only alleged that Kopf's actions were performed or "[were] caused to have been undertaken or performed by virtue and under the authority of her office as President of her co-defendant Board of Education." (Pet. App. A-9, ¶ 11.) This statement, however, does no more than assert that Kopf was performing her official duties when she committed the alleged misconduct that was the subject of Jungherr's accusations. Not only were Jungherr's remarks directed at Kopf individually, Kopf's motivation for filing the libel action was entirely personal. The purpose of her lawsuit, Jungherr alleged, was to cause him to refrain from making further comments about Kopf while she was a "declared candidate for re-election." (Pet. App. at A-11, ¶ XI.)

In summary, Jungherr's comments were directed at Kopf for what he believed was her criminal misconduct in the transaction of business for the SFUSD. Jungherr did not make, nor did Kopf file an action against him for, defamatory comments about the Board or the SFUSD. In Jungherr's complaint, Kopf's role as a public official is limited only to the allegations that she had abused her office in transacting business and that she intended to silence his criticism during an election year. Jungherr did not allege that Kopf was authorized to bring a libel suit on behalf of

the SFUSD, for such an allegation would have been contrary to state law. Instead, Jungherr's federal complaint sought damages arising only out of his defense of a defamation action brought by a public official for libelous remarks directed, by name, at that public official.

In its order below, the District Court recognized that this Court has permitted public officials to recover damages for defamatory attacks on the performance of official duties if the evidence satisfies the standards of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The First Amendment provides sufficient protection for free speech, the District Court determined, in the burden of proof a public official must satisfy under *New York Times* in order to prevail in a defamation suit.

In upholding the District Court's decision, the Ninth Circuit noted that Jungherr had failed to identify the manner in which Kopf acted under color of law when she sued Jungherr for damage done to her reputation. *Jungherr v. San Francisco Unified School Dist.*, 923 F.2d 743, 744 (9th Cir. 1991). Even if there were a basis for an allegation that Kopf acted under color of law, the Ninth Circuit determined that the standards of *New York Times* insulated a critic's speech from the chill entailed by facing a defamation action. Drawing on *Calder v. Jones*, 465 U.S. 783 (1984), the appeals court refused to give a "double" obeisance to free speech: first, through the imposition on the public official plaintiff of a heavy burden of proof, and second, through the creation of a special federal right to recover damages against an unsuccessful plaintiff. *Jungherr*, 923 F.2d at 743.

The Ninth Circuit's opinion is in accord with this Court's leading decisions on defamation actions by public officials. A public official may file a lawsuit for personally libelous remarks regarding his conduct of business, and the decision to file such a suit—no matter how frivolous the action—has never been held to give rise to a correlative constitutional claim. To the contrary, this Court has held that the mere filing of a state claim does not give rise to federal damages against the responsible public official. The opinion is also consistent with this Court's regularly expressed reluctance to create constitutional torts for what are essentially private wrongs. Jungherr not only failed to identify any state

action as the moving force behind Kopf's lawsuit, he made no showing that state law remedies were insufficient to recover his litigation costs. Therefore, the Ninth Circuit's decision presents no conflict with the well-established privilege for criticism of a public entity, and the case does not warrant review by this Court.

I

THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THE GENERAL PRINCIPLE THAT A PUBLIC ENTITY MAY NOT RECOVER DAMAGES FOR DEFAMATION.

In his petition, Jungherr argues that the Ninth Circuit has held that a government entity may recover damages in an action for defamation against a government critic. Jungherr maintains that this holding is contrary to *New York Times v. Sullivan* as well as the decisions of three state supreme courts. Alternatively, Jungherr maintains that this Court should review this case in order to resolve the question of whether a government entity may maintain a libel action.

Jungherr's petition rests on a spurious premise. The Ninth Circuit's decision does not intimate a departure from the general principle that a public entity may not recover damages for defamation. The appeals court in the instant case was not presented with a case of a public entity seeking to recover damages for libel. As demonstrated above, Jungherr was the defendant in an action by a public official seeking damages for harm to her reputation alone. The Ninth Circuit simply held that a defendant could not maintain a claim under 42 U.S.C. § 1983 against a public official who filed an unsuccessful defamation action.

A. Petitioner Jungherr Was The Defendant In An Action Brought By A Public Official For Remarks Directed Solely At That Official; Jungherr Was Not Sued For Libel Against The Government.

It has long been established that criticism of a government institution, no matter how false or disparaging, is absolutely

privileged. In *New York Times*, this Court applied this principle to hold that an "impersonal attack on governmental operations" could not constitute an actionable libel of an official responsible for those operations. 376 U.S. at 292. The Court held that a general commentary on the treatment of certain persons by the police in Alabama could not constitutionally support a defamation action by a police commissioner who was never identified in the disparaging remarks. Because "there was no other evidence to connect the statements with" the police commissioner, the statements were absolutely protected as criticism of governmental operations. *Id.*

By contrast, the instant case presents not an "impersonal attack on government" but a direct accusation of illegal conduct committed by a particular, named public official. Jungherr's allegations against Kopf are similar to those at issue in *Coleman v. MacLenan*, 78 Kan. 711, 98 P. 281 (1908), a decision that formed the basis of the "actual malice" standard set forth in *New York Times*. In *Coleman*, the plaintiff, the state attorney general and a candidate for re-election, was charged by a newspaper with mismanagement in connection with a school-fund transaction. The Kansas Supreme Court held that the plaintiff could recover damages for defamation if he established actual malice. This Court expressly approved this approach in *New York Times*. A public official may recover damages for libelous statements directed at his official conduct, but only if he can establish actual malice. *New York Times*, 376 U.S. at 281. This was exactly the theory of Kopf's lawsuit against Jungherr.

B. Because Jungherr's Allegedly Libelous Remarks Were Directed At An Individual Official, The Ninth Circuit's Holding Does Not Contradict Those Decisions That Accord An Absolute Privilege To Criticism Of Government Institutions.

As noted above, Jungherr's direct accusation that Kopf had engaged in improper and criminal behavior is a far cry from the attenuated, virtually imperceptible allusion to a police commissioner condemned as constitutionally insufficient in *New York Times*. The highly personal nature of Jungherr's alleged defamation also distinguishes the instant case from those holdings cited

in the petition for the proposition that libel does not run against the government. In each case cited by petitioner, the allegedly libelous remarks were impersonal comments regarding a government institution, and the institution itself sought damages for harm done to its reputation.

In *City of Chicago v. Tribune Co.*, 307 Ill. 595, 139 N.E. 86 (1923), the government of Chicago was the plaintiff in a libel action against a defendant newspaper that published articles about the city's financial condition. No individual officials were identified or allegedly harmed by the stories. The only alleged injury was to the City's credit and financial standing. Similarly, in *Johnson City v. Cowles Communications, Inc.*, 477 S.W.2d 750, 751 (Tenn. 1972), a municipal corporation sued a defendant in connection with an article that depicted the city as "fascist." No individual official sought damages to his or her reputation. In *Cox Enterprises v. Carroll City-County Hosp. Auth.*, 247 Ga. 39, 273 S.E.2d 841 (1981), a hospital authority brought a libel action against a newspaper for a story criticizing the authority's operations. The remarks were held absolutely privileged; they did not refer to or identify specific individuals.

Petitioner cites these three holdings as well as dictum in the *City of Long Beach v. Bozek*, 31 Cal.3d 527 (1982), *vacated*, 459 U.S. 1095, *reinstated*, 33 Cal.3d 727 (1983), for the undisputed principle that remarks critical of government cannot form the basis for a libel action by government. The instant case, however, concerns libelous remarks directed at a public official, not at a government entity. The plaintiff in the original lawsuit was not government but an individual public official. As this Court held in *New York Times*, the absolute privilege for criticism of government does not immunize a speaker who directs libelous remarks at a particular public official, even if those remarks concern the conduct of official business.

Petitioner failed to disclose that the courts of the states allegedly in conflict with the Ninth Circuit have permitted a public official to recover damages for libelous remarks directed at the discharge of official duties. For example, in *Catalano v. Pechous*, 83 Ill.2d 146, 419 W.E.2d 350 (1980), *cert. denied*, 451 U.S. 911 (1981), the defendant allegedly made statements at a meeting of

a city council implying that several aldermen had been bribed by a company doing business with the city. The Illinois Supreme Court upheld a summary judgment in favor of the public officials under the standards of *New York Times* and its progeny. Both the Tennessee and Georgia supreme courts also permit public officials to maintain libel actions for defamatory remarks directed at their official conduct. *See Cox Enterprises*, 273 S.E.2d at 843 n.2; *Press, Inc. v. Verran*, 569 S.W.2d 435, 442 (Tenn. 1978).

In summary, the Ninth Circuit's decision in the instant case does not deviate from the principle that government has no cause of action for a libel against it. Instead, the decision stands only for the rule that the filing of a defamation action by a public official for remarks directed at that official does not give rise to a correlative claim under 42 U.S.C. § 1983 for a constitutional violation. Petitioner's attempt to concoct a conflict in the law must be rejected.

II

IN KEEPING WITH THIS COURT'S PRECEDENTS, THE NINTH CIRCUIT PROPERLY DECLINED TO CREATE A CONSTITUTIONAL BASIS FOR A COUNTERSUIT AGAINST AN UNSUCCESSFUL PLAINTIFF IN A DEFAMATION ACTION.

A. The Filing Of A Defamation Action By A Public Official Does Not Constitute An Act Under Color Of Law.

To maintain his action under 42 U.S.C. § 1983, petitioner was required to allege that his constitutional rights were violated "by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). As the Ninth Circuit noted, Jungherr failed to make this allegation in his federal complaint. 923 F.2d at 745. This was not simply a pleading error that could be corrected by an amendment. Kopf's action asserted a personal right against Jungherr. California's libel law created the cause of action and federal constitutional law dictated the standard of proof. But Kopf's actions in filing the complaint cannot be attributed to the exercise of official state power. *Polk County v. Dodson*, 454 U.S.

312, 321 (1981). Therefore, Jungherr could not maintain a claim under section 1983.

The fact that state law authorizes a defamation action by a public official does not satisfy the requirement of demonstrating that constitutional rights were abridged by an act under color of law. A plaintiff must show that state action is the moving force behind the alleged deprivation. "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law, is action taken 'under color of' state law." *United States v. Classic*, 313 U.S. 299, 326 (1941); *Screws v. United States*, 325 U.S. 91, 109 (1945); *Polk County*, 454 U.S. at 317-18; *West*, 487 U.S. at 49. While a defendant's actions need not be lawful to be under color of law, those actions must be related to the powers and duties conferred on the defendant. This Court has recently stated that "generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." *West*, 487 U.S. at 50.

This Court's precedents require that a public officer be "performing official duties" in order for the officer's actions to be taken under color of law. *Screws*, 325 U.S. at 110. In *United States v. Classic*, for instance, plaintiffs alleged that their right to vote in a primary election had been infringed. This Court emphasized that "[t]he alleged acts of appellees were committed in the course of their performance of duties under the Louisiana statute requiring them to count the ballots, to record the result of the count, and to certify the result of the election." 313 U.S. at 325-26. The Court, therefore, held that defendants' actions were taken under color of state law. *Id.* at 326.

Under the standard set forth by this Court, Kopf's filing of a defamation action was not conduct under color of state law within the meaning of section 1983. Kopf's action was not "made possible only because [she was] clothed with authority of state law"; she merely exercised a right common to all citizens. *Classic*, 313 U.S. at 326. No state or local law granted Kopf the authority to bring a defamation action on behalf of the school board by virtue of her position as president. In fact, respondent was without

authority to file *any* lawsuit on behalf of the Board.[1] Initiating lawsuits of any type was simply not one of Kopf's official duties or "responsibilities pursuant to state law." *West*, 487 U.S. at 50. The filing of her defamation suit, therefore, could not be an action taken "in her official capacity." *Id.* As such, the suit cannot be deemed to have been initiated "under color of state law."

Nor can Kopf's private conduct be transformed into action under color of law by virtue of her employment with the school district. In *Polk County v. Dodson*, 454 U.S. at 321, this Court held that a public defender's employment relationship with the state "is insufficient to establish that a public defender acts under color of state law within the meaning of § 1983." The issue in *Polk County* was whether a public defender's decision to withdraw as counsel deprived respondent of his right to effective representation under color of law. In holding that the defender's action could not be attributed to the state, this Court noted that:

> [the] assignment entailed functions and obligations in no way dependent on state authority. From the moment of her appointment, [the attorney] became Dodson's lawyer, and Dodson became [the attorney's] client. Except for the source of payment, their relationship became identical to that existing between any other lawyer and client.

Id. at 318. Central to the Court's analysis was the notion that the public defender's representation of respondent was "essentially a private function . . . for which state office and authority are not needed." *Id.* at 319.

As in *Polk County*, Kopf's filing of a defamation suit was no different than an action taken by any private citizen. The only

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[1] California Education Code § 35161 confers any power granted to a school district by law to the district's governing board. A majority vote of all of the governing board members is required to take any official action. Cal. Educ. Code, §§ 35163, 35164. Noting these provisions and the "fundamental distinction" between a governing board and its individual members, the California Attorney General has stated that only a school board acting as a whole can direct county or private counsel. 70 Ops. Cal. Atty. Gen. 42, 43-44 (1987). An individual board member, acting independently, is without such power. *Id.*

relevance of her public office was that, as a public official, she faced a higher burden in establishing her claim against a libel of her performance of her duties. The filing of the suit was "essentially a private function . . . for which state office and authority [were] not needed." *Polk County*, 454 U.S. at 319. Although Kopf brought the action while she was a public official, she sought to redress harm to her own reputation. The action was clearly "in the ambit of [her] personal pursuits" and therefore excluded from section 1983. *Screws*, 325 U.S. at 110. Petitioner's complaint was properly dismissed.

B. Even If A Public Official's Filing Of A Defamation Suit Could Be Attributed To State Action, This Court's Decisions Fully Support The Ninth Circuit's Refusal To Establish A New Civil Rights Claim.

This Court has repeatedly discouraged the creation of constitutional torts to mirror remedies available at state law. This Court has rejected reasoning that would make the Fourteenth Amendment's application of constitutional rights against the states "a font of tort law to be superimposed upon whatever system may already be administered by the States." *Daniels v. Williams*, 474 U.S. 327, 332 (1986) (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)). Jungherr's invitation to create a new constitutional tort, however, proceeds exactly from this improper reasoning.

Because he was compelled to defend what he believes was a meritless action in state court, Jungherr insists that he is entitled to a federal forum for his claim of malicious prosecution against Kopf. This Court has never held that the filing of a lawsuit gives rise to actionable damages. On the contrary, this Court has recognized a broad privilege for civil actions filed by public officials.

In *Butz v. Economou*, 438 U.S. 478 (1978), the plaintiff alleged that a government agency had instituted proceedings against him in retaliation for his criticism of the agency. The initiation of these proceedings allegedly violated the plaintiff's First Amendment rights. This Court held that the "decision to move forward with an administrative proceeding" was entitled to absolute immunity. *Id.* at 516. The "legal remedies available to

the defendant in such a proceeding provide sufficient checks" on the overzealous public official. *Id.*

In the instant case, the Ninth Circuit's decision follows closely the rationale expressed in *Butz*. The appellate court held that the rigorous standards of *New York Times* provide sufficient safeguards against misguided libel suits. The availability of summary judgment if a plaintiff fails to meet these standards protects a defendant from "protracted litigation." 923 F.2d at 745.

In addition to the protections inherent in any libel action by a public official, state law provided Jungherr with specific recourse. California provides a full panoply of damage remedies for malicious prosecution. *See Walsh v. Bronson*, 200 Cal.App.3d 259 (1988). Even if such a claim is unavailable, California courts have broad discretion to award attorneys fees and costs in the initial action. *See City of Long Beach*, 31 Cal.3d at 538 (a plaintiff who could not pursue a malicious prosecution claim can recover litigation expenses).

With respect to the particular claims in the instant case, the Ninth Circuit correctly refrained from fashioning the principles of *New York Times* into a new federal cause of action. In *Calder v Jones*, this Court refused to incorporate these principles into a rule that would limit personal jurisdiction in defamation actions. 465 U.S. at 790-91. Petitioner urges a broader jurisprudential extension than the defendant requested in *Calder*. Petitioner would have the courts recognize a new constitutional tort based on a rarified construction of *New York Times*. This result would be contrary both to the common law privilege accorded lawsuits and this Court's holding that the filing of a lawsuit does not give rise to an actionable claim under section 1983. Petitioner's approach, moreover, offers no limiting principle; any unsuccessful state action could give rise to a federal claim solely on the bare allegation that the initial action was filed in retaliation for criticism of government. The Ninth Circuit's refusal to recognize such claims should not be disturbed.

CONCLUSION

Petitioner Jungherr seeks to induce this Court's review by portraying the instant case as a threat to the absolute privilege to criticize government. That privilege, however, is not at issue. Jungherr prevailed against a libel claim based on accusations of criminal misconduct that he leveled at a particular government official. That official, asserting a right common to all citizens, brought a defamation action against Jungherr for damages done to her reputation. The suit was clearly authorized by this Court's decisions permitting a public official to recover such damages upon showing of actual malice.

In its decision below, the Ninth Circuit held that a public official's filing of an unsuccessful libel suit does not give rise to a violation of constitutional rights actionable under section 1983. This decision is consistent with this Court's reluctance to create a constitutional tort for a claim of malicious prosecution and its refusal to transform defenses to libel suits into new doctrines and causes of action. Therefore, the case merits no further review and the petition should be denied.

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Respectfully submitted,

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